Supreme Court, U.S.
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No. 97-1117

In The

Supreme Court of the United States

October Term, 1997

PAUL G. SHULTZ,

Petitioner,

v.

DEPARTMENT OF ARMY,
UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE UTAH ASSOCIATION OF COUNTIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

INTRODUCTION[1]

The final opinion of the United States Court of Appeals for the Ninth Circuit in this case, *Shultz v. Army*, 96 F.3d 1222 (9th Cir. 1996) (*Shultz III*), eviscerates Alaska state law as applied to rights-of-way perfected under the grant of 43 U.S.C. § 932 (R.S. 2477). The steps leading up to this decision, clearly at odds with the Alaska Supreme Court's ruling in *Fitzgerald v. Puddicombe*, 918 P.2d 1017 (Alaska 1996), suggest that the Ninth Circuit Court's action is part of a trend towards a substitution of arbitrary federal power for the rule of law when dealing with these vested property rights. The Utah Association of Counties (UAC) believes that it is important for this Court to address the Ninth Circuit Court's disregard for established Alaska law, thereby sending a clear message that federally created estates on public lands will be protected by established law.

UAC's interest in the subject of this litigation arises from the considerable interest among the counties of rural Utah in protecting their ability to maintain the transportation infrastructure that has been delegated to their authority by the state of Utah.[2] UAC is a non-profit

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] UAC participated by the filing of an *amicus curiae* brief in connection with the petition for rehearing in this matter before the United States Court of Appeals for the Ninth Circuit and as

Utah corporation whose membership is comprised of each of the counties and the elected officials of each county of the State of Utah.[3]

II.
DISCUSSION

In order to provide some perspective on the case currently before the Court, UAC will present some of the history pertaining to the fluctuating and increasingly hostile federal treatment of rights-of-way granted under R.S. 2477, as trends in this country have changed over the years.

The traditional and appropriate management of the local transportation infrastructure where it crosses federally owned lands has been under increasing attack, first from environmental groups and, since 1992, by the federal land managing agencies. This trend can be seen, perhaps, as a continuation of the larger trend away from divestment of the public domain towards preservation of

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amicus curiae in *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) and related proceedings, addressing the law of rights-of-way granted under R.S. 2477.

[3] UAC's interest in this matter is not just academic. Within the past two years, several rural Utah counties have been sued in trespass by federal agencies and environmental groups for conducting maintenance activities on county roads which traverse the federal domain. While space does not permit a lengthy presentation of the considerations raised by those cases, UAC believes that they represent an effort to overwhelm rural counties poorly equipped, financially and otherwise, to defend against a multiplicity of trespass claims arising from unprecedented interpretations of law.

the public domain, which began in earnest on October 21, 1976, with the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 *et seq. See, e.g., Hodel*, 848 F.2d at 1078. FLPMA repealed R.S. 2477, but explicitly protected rights-of-way already perfected.[4] In any event, the express direction of Congress to honor valid existing rights has recently begun fading from federal administrative consciousness.

A.

THE LEGAL PRINCIPLES DEVELOPED AROUND R.S. 2477 ARE CLEAR

Up until now, the state and federal courts have staunchly protected R.S. 2477 rights-of-way in accordance with common law and common sense. Accordingly, the law developed around R.S. 2477 recognizes the following principles:

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[4] FLPMA contained the following explicit provisions:

> All actions by the Secretary concerned under this Act shall be subject to valid existing rights.

43 U.S.C. § 1701 note (h).

> Nothing in this Act [see Short Title note set out above], or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act [Oct. 21, 1976].

43 U.S.C. § 1701 note (a).

> Nothing in this title shall have the effect of terminating any right-of-way or right-of-use heretofore issued, granted or permitted.

43 U.S.C. § 1769(a).

(1) R.S. 2477 must be interpreted in accordance with the intentions of the Congress which passed the law. *Hodel*, 848 F.2d at 1082. *See also, Leo Sheep Co. v. United States*, 440 U.S. 668, 681-82 (1979).

(2) The term "highway" must likewise be interpreted as understood in 1866 and in accordance with state law. *Central Pacific Railway Co. v. Alameda County*, 284 U.S. 463, 467, 472-473 (1932).

(3) As recognized in *Shultz III*, the provisions of R.S. 2477, insofar as they pertain to the method of perfection and the scope of the right-of-way, must be interpreted in accordance with the law of the state where the statute is being applied. *Hodel*, 848 F.2d at 1083. The Department of Interior recognized this fundamental principle until recently. *See*, 43 C.F.R. § 244.55 (1938); 43 C.F.R. §§ 2822.1-1, 2822.2-1 (1974).

In Alaska, as in other states, while a highway under R.S. 2477 must be open to the public to come and go freely at will, it could be a footpath, horse trail, or a road passable by horse wagons or motor vehicles. *Alameda County*, 284 U.S. at 467. (Highways under 43 U.S.C. § 932 can also be roads "formed by the passage of wagons, etc., over the natural soil."). *Wilkenson v. Dept. of Interior*, 634 F.Supp. 1265, 1272 (D. Colo. 1986). ("The trails and wagon roads over the lands which became part of the Colorado National Monument were sufficient to be 'highways' under 43 U.S.C. § 932.")

These decisions were consistent with the legal definition of the term "highway:"

> The term highway is the generic name for all kinds of public ways, whether they be carriage-

> ways, bridle-ways, footways, bridges, turnpike roads, railroads, canals, ferries, or navigable rivers. Bouv. Law Dict., Rowle's Third Rev. p. 1438, Tit. Highway; Elliott, Roads and Streets, p. 1; 25 Am.Jur., 340.

Parsons v. Wright, 27 S.E.2d 534, 536 (N.C. 1943)

Where state law so provided, a public highway could be created by use alone. " 'User is the requisite element, and it may be by any who have occasion to travel over public lands, and if the use be by only one, still it suffices.' " *Wilkenson*, 634 F.Supp. at 1272 (quoting *Leach v. Manhart*, 102 Colo. 129, 133, 177 P.2d 652, 653 (1938)). Clearly, the established law allows for vesting of highway rights-of-way by any means authorized by state law.

The *right* of access, in the minds of some, runs counter to the desire to preserve the public lands from the potential effects of human intrusion. Thus, R.S. 2477 rights-of-way have become, over the years, a focal point for those who would see the public lands cut off from the public and returned to some perceived state of "primeval" character. But for the people of the rural West, who have set their roots over the generations into rugged areas with few routes of access to and across vast stretches of federal domain,[5] these same rights-of-way form the backbone for human connections, commerce and enjoyment of their heritage.

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[5] Approximately 67% of the lands within the borders of the State of Utah are owned by the federal government. In Garfield County, approximately 93% of the lands are federally owned.

B.

RECENT ACTIONS HAVE ATTEMPTED TO UNDERCUT THE ESTABLISHED LAW

The onslaught against R.S. 2477 rights-of-way began in earnest in the 1980's, most notably in Utah with a case filed by the Sierra Club, the National Parks and Conservation Association (NPCA), the Southern Utah Wilderness Alliance (SUWA), and the Wilderness Society in 1987 to stop a road improvement project on a remote rural highway which has become popularly known as the "Burr Trail" Road. *Sierra Club v. Hodel*, 675 F.Supp. 594 (D. Utah 1987); 848 F.2d 1068 (10th Cir. 1988) represented a concerted effort by environmental groups to change or reinterpret the law of R.S. 2477 which, if it had been successful, would have terminated or severely restricted hundreds of traditional access routes forming a public highway system serving the general public.

Sierra Club *et al.* were largely unsuccessful in their claims in *Hodel*.[6] As recited above, the courts ruled, consistently with the well-established body of law and then-existing federal regulations and other guidance, that state law governs both the perfection and scope of R.S. 2477 rights-of-way and that traditional principles of the common law of easements should be looked to when resolving questions about these property rights. 848 F.2d at 1083, 1087.

Not long after Secretary of Interior Bruce Babbitt took office, a concerted effort was undertaken to rewrite

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[6] The road improvement project under attack in that case has been completed.

the agency-made guidance pertaining to R.S. 2477 rights-of-way, beginning with a directive to the Bureau of Land Management to refuse to acknowledge any R.S. 2477 rights-of-way, except where the right-of-way holder has shown "a compelling and immediate need to have a road acknowledged as a R.S. 2477 highway" (Bureau of Land Management Instruction Memorandum No. 93-113, January 22, 1993)[7], and culminating in the publication of draft regulations purporting to govern R.S. 2477 rights-of-way in 1994 (59 Fed. Reg. 39,216 (1994)). The draft regulations took a very aggressive posture against these rights-of-way, which amounted to an about face from the current agency regulations which have been on the books since 1938. *See*, Hjelle, *Ten Essential Points Concerning R.S. 2477 Rights-of-Way* and *Reply to Mr. Lockhart: An Explanation of R.S. 2477 Precedent*. 14 Journal of Energy, Natural Resources & Environmental Law 301, 349 (1994).

The regulations proposed by Secretary Babbitt provoked an outcry throughout the West, and have never been finalized. In fact, Congress expressed its intent to protect these valid existing property rights from the excesses of administrative overreaching by passing Section 108 of the Department of Interior and Related Agencies Appropriations Act, 1997, which provided:

> No final rule or regulation of any agency of the federal Government pertaining to the recognition, management, or validity of a right-of-way pursuant to Revised Statute 2477 (43 U.S.C. 932) shall take effect unless expressly authorized by

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[7] Document 1 lodged with the Clerk of the Court on March 9, 1998.

> an Act of Congress subsequent to the date of enactment of this Act [Sept. 30, 1996].

43 U.S.C.A. § 932 Savings Provisions (1998).

In spite of the Congressional moratorium, Secretary Babbitt has revoked existing Department of Interior policy, substituting a new policy entirely inconsistent with the established law of R.S. 2477 and current Departmental regulations pertaining to R.S. 2477, and putting into effect the very principles that Congress had prohibited him from promulgating through the legitimate regulatory process. Memorandum from Secretary of Interior to Assistant Secretaries (January 22, 1997) regarding "Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-way for Public Highways; Revocation of December 7, 1988 Policy."[8]

Meanwhile, Paul G. Shultz had been quietly marshaling the facts and the law to show that a valid R.S. 2477 right-of-way had been established across the lands subsequently encompassed by Fort Wainwright. The Court of Appeals for the Ninth Circuit, initially applying the law as it stood, found in his favor in *Shultz v. Army*, 10 F.3d 649 (9th Cir. 1993) (*Shultz II*). *Shultz II*, albeit consistent with the large body of law on R.S. 2477, was apparently perceived by the Department of Interior to be adverse to the new agenda for environmental interests. The Department of Interior, through its solicitor, John Leshy, joined in the Department of the Army's petition for rehearing before the Ninth Circuit Court, articulating the new R.S.

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[8] Document 2 lodged with the Clerk of the Court on March 9, 1998.

2477 agenda, and the NPCA, the Wilderness Society, the Audubon Society, SUWA, the Sierra Club and the Northern Alaska Environmental Center followed suit with a joint amicus curiae brief.[9] The result, as now before this Court, was an inexplicable reversal by the Ninth Circuit Court.

The temptation of federal bureaucrats and special interest groups to overlook the law of the State of Alaska in favor of an interpretation which supports the exercise of federal administrative power without consideration for intervening property rights and which satisfies currently popular political goals is understandable. But such an inexplicable diversion from settled law into judicial activism should not be countenanced from the courts. The selective choice to disregard the law of the state of Alaska represents a significant danger to the rule of law.

III.

CONCLUSION

UAC respectfully suggests to this Court that, if given an opportunity to more fully present the history and the law pertaining to R.S. 2477 rights-of-way, it will be clear that *Shultz II* was the proper decision and *Shultz III* can only be viewed as the first step away from the rule of law by a federal court dealing with R.S. 2477, a step which must be checked before the public is denied access to

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[9] Four of these groups, NPCA, SUWA, the Sierra Club, and the Wilderness Society were the same groups who initiated the R.S. 2477 controversy in Utah with the filing of *Hodel*.

vested western transportation networks. UAC respectfully requests this Court to grant Paul G. Shultz's petition for a writ of certiorari, to correct a decision of the Ninth Circuit Court which is clearly in conflict with the law set forth by the Alaska Supreme Court.

Respectfully submitted,

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